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No. 90-1762

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

VIDA WILLIAMS,

*Petitioner,*

vs.

GARBAN LTD.; GARVIN BANTEL CORP.; and GARVIN GUYBUTLER, INC.,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Court of Appeals' affirmance of the District Court's factual finding that the employer did not discharge plaintiff because of her age raises any issue warranting review by this Court?

**STATEMENT PURSUANT TO RULE 29.1**

Respondents Garban Ltd. and Garvin GuyButler, Inc. are wholly-owned subsidiaries of Mills & Allen International plc, which has its principal place of business in London, England.

Named respondent Garvin Bantel Corp. did not make any appearance in this action. Garvin Bantel Corp. was dissolved prior to the commencement of the action.

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## FEDERAL STATUTE INVOLVED

### 29 U.S.C. § 623(a)
### Prohibition of Age Discrimination

(a) Employer practices

It shall be unlawful for an employer --

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

## STATEMENT OF THE CASE

After a bench trial, District Judge Morris E. Lasker found that (i) Petitioner had failed to establish a prima facie case under the Age Discrimination in Employment Act

("ADEA"), and (ii) Respondent did not discharge Petitioner on account of her age (Pet. at A-6).

The Court of Appeals for the Second Circuit expressly affirmed the District Court's determination that Petitioner had not established a prima facie case (Pet. at A-2). The Court of Appeals also found "ample support in the record" for the District Court's finding that Petitioner's discharge was not motivated by age discrimination (Id.).

## REASONS FOR DENYING THE WRIT

### IN AFFIRMING THE DISTRICT COURT'S FINDINGS OF FACT, THE COURT OF APPEALS MERELY APPLIED WELL-SETTLED LAW

#### A. The Court of Appeals Did Not Apply a "New Interpretation" of the Age Discrimination in Employment Act

Petitioner asserts that the Court of Appeals erred "by requiring that Petitioner prove the Respondent's `intent' to engage in discriminatory conduct" because, she contends, proof of intent "is not requisite to establishing a prima facie case" (Pet. at 6).

The Court of Appeals, however, did not hold that direct proof of "intent" is an "element" of a prima facie case. It simply alluded to the unremarkable -- and correct -- proposition that the ultimate issue in an age discrimination case is whether the employer's action was motivated by age. See 29 U.S.C. § 623(a) (prohibiting discrimination

"because of . . . age"). As this Court held in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981): "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id. at 253 (emphasis added).

Petitioner argues that because the District Court rejected reasons for her discharge proffered by Respondents, a judgment in her favor was required. This argument was expressly rejected in Burdine:

> The burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether

> it discriminated against the plaintiff. . . .
>
> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.

450 U.S. at 254-56 (emphasis added). The District Court and the Court of Appeals correctly applied the foregoing principles and concluded that Petitioner was not discharged because of her age.

B. Petitioner Did Not Establish a Prima Facie Case

Neither the District Court nor the Court of Appeals required Petitioner to produce direct evidence of intent. Rather, the District Court applied the Second Circuit's well-settled, four-part test, requiring the plaintiff to establish that (1) she was within the protected age group; (2) she was

qualified for the job; (3) she was discharged; and (4) the discharge occurred under circumstances giving rise to an inference of age discrimination. Hollander v. American Cyanamid Co., 895 F.2d 80, 83 (2d Cir. 1990).

In his findings of fact and conclusions of law, District Judge Lasker articulated the fourth element of the prima facie case with particular reference to the disputed issues at trial, noting that Petitioner needed to demonstrate that she was replaced by "someone not in the statute's protected class" (Pet. at A-5). Judge Lasker used this formulation because a "replacement" argument was the principal theory that Petitioner herself advanced at trial in an attempt to satisfy the fourth element of the test, i.e., that there be some evidence giving rise to an inference of age discrimination. Judge Lasker

expressly found that Petitioner's evidence was clearly inadequate to meet the fourth element (Pet. at A-6 to A-7).

Petitioner now suggests that her inability to establish a prima facie case was due to Judge Lasker's articulation of the fourth element (Pet. at A-6). It has long been understood that presentation of the elements of a prima facie case of discrimination may vary with the factual situation. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973); United States Postal Service v. Aikens, 460 U.S. 711, 715 (1983). Moreover, Judge Lasker's formulation of the fourth element has been repeatedly recognized as the most appropriate articulation for age discrimination cases. Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 69 (6th Cir. 1982); Hill v. Department of the Air Force, 796 F.2d 1469, 1472 (Fed.

Cir. 1986) (Newman, J., concurring); Moody v. Pepsi-Cola Metropolitan Bottling Co., 915 F.2d 201, 208 (6th Cir. 1990).

Finally, the record makes clear that had Judge Lasker chosen to articulate the fourth element in a different manner, the evidence in this case was patently insufficient to establish that "the discharge occurred under circumstances giving rise to an inference of age discrimination." Hollander, supra, 895 F.2d at 83. As Judge Lasker found, "at the time they were hired and at the present time, the clear majority of employees in [Petitioner's] department were or are over 40 years of age. Some are now in their 60's and have been with the company for many years. On the other hand, the plaintiff herself was only 40-41 at the time of her

discharge." (Pet. at A-6). Additionally, Judge Lasker found "incredible" Petitioner's theory that Respondents discriminated against her for financial reward; the findings made clear that Petitioner's discharge was in no way financially beneficial for Respondents (Id.). Petitioner did not contest these findings in the Court of Appeals, and does not contest them now. The circumstances surrounding Petitioner's discharge simply do not give rise to an inference of age discrimination.

C. The ADEA Does Not Prohibit Discharge Based on "Personal Dislike"

While Petitioner relies on Judge Lasker's finding that "personal dislike" was the "true reason" for Petitioner's discharge, she simultaneously asks this Court to reject Judge Lasker's accompanying finding that this "true

reason" was simply not a pretext for age discrimination.

Courts have long recognized that the ADEA "`does not cast upon the court the duty of determining that a discharge was, for reasons other than age, a justifiable discharge. It serves only to prevent discharge because of age alone.'" Reich v. New York Hospital, 513 F. Supp. 854, 863 (S.D.N.Y. 1981) (quoting Brennan v. Reynolds & Co., 367 F. Supp. 440, 444 (N.D. Ill. 1973)); Parcinski v. Outlet Co., 673 F.2d 34, 36 (2d Cir. 1982), cert. denied, 459 U.S. 1103 (1983).

Petitioner incorrectly asserts that a discharge stemming from "personal dislike" violates the ADEA. As Judge Lasker stated in his findings of fact and conclusions of law, a violation of the ADEA requires Petitioner to prove that her discharge was the result of

discrimination on the basis of age; an accusation that the discharge was unfair is not sufficient.

## CONCLUSION

The Petition for a Writ of Certiorari merely challenges the fact-findings of the courts below. Those courts simply applied well-settled law in finding that the evidence was woefully insufficient to prove age discrimination.

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: June 14, 1991

Respectfully submitted,

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